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DEFENDANT HORSE RACING LABS, LLC'S STATEMENT OF GENUINE DISPUTES OF MATERIAL FACT

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17:11; Answer to First Amended

¹ Derby Wars incorporates the "Issue" heading scheme implemented by Plaintiffs. However, in restating Plaintiffs' language in quotation marks, DW in no way admits the substance of Plaintiffs' contentions and, in fact, directly objects to and denies them.

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$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	Complaint, (Docket No. 34), ¶ 11.	
5	2. Since 2009, HRL has operated	UNDISPUTED.
6	HorseRacingNation.com.	
7		
8	Midland Depo., 44:7-10; 45:11-14.	
9	3. HorseRacingNation.com is a website	DISPUTED in part.
10	for horseracing.	HorseRacingNation is a free online
11		community that has stories, blogs,
12	Midland Depo., 45:15-19.	pictures and news about horse racing; it
13		is a "fan site" for horse racing.
14		(Declaration of Matthew P. Kanny in
15		Support of Defendant Horse Racing
16		Labs, LLC's Motion for Summary
17		Judgment (Docket No. 63) ("Kanny
18		Decl.") ¶ 3, Ex. B) ("Midland Dep.") at
19		45:15-19; Declaration of Mark Midland
20		in Support of Defendant Horse Racing
21		Labs, LLC's Motion for Summary
22		Judgment (Docket No. 63-2) ("Midland
23		Decl.") ¶ 6.)
24	4. In October, 2011, HRL launched the	UNDISPUTED.
25	DerbyWars.com website.	
26		
27	Midland Depo., 72:3-5.	
28 LPS &	5. Defendant operates out of an office	UNDISPUTED that Derby Wars' office DEFENDANT HORSE RACING LABS, LLC'S

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1	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4	building in Kentucky.	is located in Louisville, Kentucky.
5		
6	Midland Depo., 16:19-17:11; 161:7-12.	
7	6. Defendant offers contests in which	DISPUTED. Derby Wars' fantasy
8	players from across the country	contests do not involve "wagers." In
9	(including players in California, Florida,	Derby Wars' pay-to-play fantasy
10	Maryland and Oregon), pay entry fees	contests, a player pays a fixed entry fee
11	interstate (to Kentucky) in order to	for the opportunity to compete in the
12	wager on races run at race tracks,	contest, and the player who earns the
13	including those operated by Plaintiffs.	most points in the contest can win a
14		predetermined prize; thus, Derby Wars'
15	Midland Depo., 166:9-167:4; 180:12-	fantasy contest are not "wagers."
16	181:24.	(Midland Dep. at 69:14-19, 72:3-74:25,
17		192:17-193:14; Midland Decl. ¶¶ 12-
18		16.) In addition, Derby Wars also
19		offers free fantasy horse racing
20		contests; thus, a player who plays a free
21		contest is not required to pay an entry
22		fee to play. (Midland Decl. ¶ 10.)
23		Further, Derby Wars consistently
24		reviews statutory and regulatory
25		requirements to ensure compliance with
26		all laws. (Declaration of Mark Midland
27		filed in support of Derby Wars'
28		Opposition to Plaintiffs' Motion for

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		Partial Summary Judgment ("Opp.
5		Midland Decl.") ¶ 12; Midland Dep. at
6		465:9-466:18.) Because of certain
7		restrictions in some states, Derby Wars
8		does not allow players from those states
9		to participate in its pay-to-play fantasy
10		contests. (Opp. Midland Decl. ¶¶ 12-
11		13.) Thus, Derby Wars does not allow
12		players from all fifty (50) states to play
13		its games, as Plaintiffs suggest.
14	7. The first page of Defendant's Derby	DISPUTED in part. Derby Wars
15	Wars' website (www.derbywars.com)	admits that the derbywars.com website
16	proclaims:	included the cited text but denies
17		Plaintiffs' characterization or that the
18	"Horse Racing Handicapping Contests"	words referenced are the only
19	"Play for free or real money"	statements made on the first page of the
20	"Pick a horse in each race"	website. DISPUTED also because it is
21	"Over \$20-million paid out in winnings!"	immaterial, lacks foundation and is
22		otherwise objectionable. See Derby
23	Declaration of Diane L. Ellis ("Ellis	Wars Objections to Plaintiffs' Evidence
24	Dec."), ¶ 4.	("DW's Evidentiary Objections").
25		
26	8. To participate in the contests, a player	DISPUTED in part. Players must
27	must first create an account with	create an account, but players can play
28	Defendant and deposit funds to the	certain of Derby Wars' contests for free
LPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	account.	without making a deposit. (Opp.
5		Midland Decl. ¶ 13; Midland Dep. at
6	Midland Depo., 168:4-19.	74:2-7; 278:2-9; 309:17-20.)
7	9. Defendant maintains players' funds in	DISPUTED. Derby Wars' fantasy
8	a bank account consisting only of	contests do not involve "wagers." In
9	players' funds, and when the player	Derby Wars' pay-to-play fantasy
10	enters a contest, his account is deducted	contests, a player pays a fixed entry fee
11	by the amount of the wager (the "entry	for the opportunity to compete in the
12	fee").	contest, and the player who earns the
13		most points in the contest can win a
14	Deposition of Michael R. Shutty,	predetermined prize; thus, Derby Wars'
15	attached to the Declaration of Richard B.	fantasy contests are not "wagers."
16	Specter as Exhibit "B," ("Shutty	(Midland Dep. at 69:14-19, 72:3-74:25,
17	Depo."), 112:16-113:24; Midland Depo.,	192:17-193:14; Midland Decl. ¶¶ 12-
18	168:17-23; 327:15-23.	16.) Further, Derby Wars does not
19		maintain players' funds in a "bank
20		account," but rather, each player sets up
21		a contest account, from which the fixed
22		entry fees are drawn. (Midland Dep. at
23		167:5-168:10; Opp. Midland Decl. ¶
24		15.)
25	10. If the player eventually wins his	DISPUTED. Derby Wars' fantasy
26	wager (the "prize"), his Derby Wars	contests do not involve "wagers."
27	account is credited with his winnings.	Derby Wars' contests involve paying a
28 ELPS &	The player can thereafter request a	fixed entry fee for the opportunity to DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DW RESTONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	withdrawal from his account, in which	compete in a contest, and the player
5	case a check is sent to him from the	who earns the most points can win a
6	Derby Wars account.	predetermined prize; thus, Derby Wars'
7		fantasy contests are not "wagers."
8	Midland Depo., 330:10-331:21.	(Midland Dep. at 69:14-19, 72:3-74:25,
9		192:17-193:14; Midland Decl. ¶¶ 12-
10		16.) Further, the predetermined prize
11		that players compete to win in a contest
12		may include different prizes depending
13		on the finish in the contest. (Opp.
14		Midland Decl. ¶¶ 16, 18.) If a player
15		scores the most points and wins the
16		contest, the player can win points,
17		entries into future contests or cash
18		prizes, all of which are added to the
19		players' account. (Opp. Midland Decl.
20		¶ 18.) For cash prizes, players can also
21		request a check withdrawal. (Midland
22		Dep. at 169:19-170:4; Opp. Midland
23		Decl. ¶ 18.)
24	11. Defendant does not hold a license to	DISPUTED in part. Derby Wars does
25	conduct wagering on horse racing in	not dispute that it does not hold a
26	California, Florida, Maryland or Oregon.	license to conduct parimutuel wagering
27		on horse races. However, Derby Wars
28 LPS &	Midland Depo., 229:9-24; 406:21-23.	disputes that a license is needed as it

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		does not participate in parimutuel or
5		any other kind of wagering and does not
6		accept bets or wagers of any kind.
7		(Opp. Midland Decl. ¶ 10; Midland
8		Dep. at 192:17-193:14.)
9	12. Defendant touts its contests as	DISPUTED in part. Derby Wars
10	allowing players to "win real money,"	disputes the characterization that it
11	and the players do win real money.	"touts" that players can win cash prizes.
12		Derby Wars does state on its website
13	Ellis Dec., ¶ 4; and Midland Depo.,	that contest players can "win real
14	181:22-24.	money" in Derby Wars' contests. (Opp.
15		Midland Decl. ¶ 13.) In Derby Wars'
16		contests, players compete to win a
17		variety of predetermined prizes, which
18		include points, entries into future
19		contests, and cash prizes. In addition,
20		in certain states, based on those states'
21		laws, players can only play free games
22		and cannot "win real money." (Opp.
23		Midland Decl. ¶¶ 12, 13; Midland Dep.
24		at 486:10-487:19.)
25	13. Defendant primarily offers contests	DISPUTED. The majority of Derby
26	that are "head-to-head".	Wars' contests involves three or more
27		players; indeed, some contests involve
28 LPS &	Ellis Dec., ¶ 6.	as many as 500 players. (Opp. Midland

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DW RESIONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	EVIDENCE	Decl. ¶ 22; Declaration of Matthew P.
5		Kanny in support of Derby Wars'
6		Opposition to Plaintiffs' Motion for
7		
8		Partial Summary Judgment ("Opp.
9		Kanny Decl.), ¶ 2, Ex. A ("Opp.
		Midland Dep.") at 151:9-15.) Further,
10		the fact that a contest may be a head-to-
11		head contest versus a multi-player
12		contest does not mean such contests are
13		"wagers" under the IHA. All of Derby
14		Wars' contests involve players paying a
15		fixed entry fee for the opportunity to
16		compete for a predetermined prize.
17		(Midland Decl. ¶¶ 12-16.) Further, all
18		of the games were designed to
19		maximize the skill involved in the
20		contests and all are games of skill,
21		where skill predominates over chance –
22		including Derby Wars' head-to-head
23		contests. (Midland Decl. ¶¶ 11, 22;
24		Kanny Decl. ¶ 6, Ex. E ("Heeb
25		Report"), ¶¶ 10, 13-17, 21-22; Opp.
26		Kanny Decl. ¶ 3, Ex. A ("Opp. Excerpts
27		of Heeb Report") Fig. 5, ¶ 97.) Further,
28 LPS &		other contest sites – including Horse

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1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4		Tourneys and Bet America – also offer
5		head-to-head contests as part of their
6		fantasy games. (Opp. Midland Decl. ¶¶
7		28-31.) For example, on March 31,
8		2017, Horse Tourneys advertised
9		numerous head-to-head tournaments,
10		including head-to-head contests using
11		Plaintiffs' tracks with fixed entry fees
12		of up to \$795 for a cash prizes of up to
13		\$1,500. (Opp. Midland Decl. ¶ 28.)
14		DISPUTED also because it is
15		immaterial, lacks foundation and is
16		otherwise objectionable. See DW's
17		Evidentiary Objections.
18	14. In these contests, two players pay an	DISPUTED in part. Plaintiffs'
19	entry fee for a fixed prize.	characterization of Derby Wars' fantasy
20		contests is inaccurate. In all of Derby
21	Midland Depo., 129:11-13.	Wars' pay-to-play (as opposed to free)
22		contests, whether head-to-head or
23		multi-player, players pay a fixed entry
24		fee for the opportunity to compete
25		against other players in the fantasy
26		contests, and the players who scores the
27		most points wins a predetermined prize.
28 LPS &		(Midland Decl. ¶¶ 12-16; Opp. Midland DEFENDANT HORSE RACING LABS, LLC'S

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2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	EVIDENCE	Decl. ¶¶ 16-18 .)
5	15 A z zu zuzun 12 fan a \$40 mina taua	, ,
6	15. As an example, for a \$40 prize, two	UNDISPUTED. Derby Wars offers
	players each pay a \$22 entry fee to	many fantasy contests where players
7	compete with each other.	compete for a predetermined prize, each
8		such contest has a fixed entry fee, a
9	Ellis Dec., ¶ 6.	maximum number of players, and a
10		predetermined prize. (Midland Decl. ¶¶
11		12-16.) Moreover, on March 31, 2017,
12		Horse Tourneys advertised several
13		head-to-head contests with entry fees of
14		\$22 and prizes of \$40. (Opp. Midland
15		Decl. ¶ 28.) DISPUTED also because it
16		is immaterial, lacks foundation and is
17		otherwise objectionable. See DW's
18		Evidentiary Objections.
19	16. The remaining \$4 is the "take out" or	DISPUTED. The predetermined prize
20	"rake" retained by Defendant.	that is paid to the winning player does
21		not come from the entry fees paid by
22	Midland Depo., 220:13-22; 233:6-10.	the participants in a particular contest,
23		and there is no set "rake" or "take-out"
24		in any of Derby Wars' fantasy contests.
25		(Midland Decl. ¶¶ 16-17; Opp. Midland
26		Decl. ¶¶ 19-20.) As part of the contest,
27		Derby Wars agrees to pay the
28 ELPS &		predetermined prize, without regard to DEFENDANT HORSE RACING LABS, LLC'S

PLAINTIFFS' ALLEGEDLY	DW RESPONSE
UNCONTROVERTED FACTS AND	
ALLEGED SUPPORTING EVIDENCE	
	whether Derby Wars makes money on
	the contest. (Midland Decl. ¶¶ 16-17.)
	Derby Wars offers thousands of fantasy
	contests in a given year, and in many of
	those contests, Derby Wars can and
	does lose money, because (among other
	reasons) the contest may not fill to
	capacity (i.e., there are less players than
	the maximum). (Midland Decl. ¶¶ 16-
	17; Kanny Decl. ¶ 2, Ex. B ("Daruty
	Dep.") at 94:8-95:8; Opp. Midland
	Decl. ¶ 20.) For example, Derby Wars
	is currently advertising a fantasy contest
	with a predetermined fixed prize of
	\$1,000, a fixed entry fee of \$25, and a
	minimum number of players of 20;
	thus, Derby Wars could lose up to \$500
	on this contest alone. (Opp. Midland
	Decl. ¶ 20.) In addition, in some
	games, including in head-to-head
	contests such as the one referenced
	here, a credit card payment may not go
	through, or a customer may have a
	customer service issue that results in the
	entry fee being refunded. Thus, there is DEFENDANT HORSE RACING LABS, LLC'S
	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	D W MEST OTHER
3	ALLEGED SUPPORTING EVIDENCE	
4		no guarantee that Derby Wars will
5		make any money in any of its contests;
6		nonetheless, Derby Wars guarantees to
7		pay the predetermined prize for each
8		contest even if it loses money. (Opp.
9		Midland Decl. ¶ 20; Midland Dep. at
10		91:11-92:24; 435:16-23.) Thus, there is
11		no "take-out" or "rake" "retained" by
12		Derby Wars.
13	17. Defendant offers head-to-head	DISPUTED in part. Derby Wars
14	contests with the prize up to \$1,500,	admits this is one of dozens of different
15	with \$799 entry fees.	fantast contests it offers. However, it
16		offers many other types of contests as
17	Ellis Dec., ¶ 5.	well. Moreover, other fantasy sports
18		contest sites – including Horse
19		Tourneys and Bet America – offer
20		contests with similar fixed entry fees
21		and prizes. For example, on March 31,
22		2017, Horse Tourneys advertised
23		numerous head-to-head tournaments,
24		including head-to-head contests using
25		Plaintiffs' tracks with fixed entry fees
26		of up to \$795 for cash prizes of up to
27		\$1,500. (Opp. Midland Decl. ¶ 28.)
28		DISPUTED also because it is

PLAINTIFFS' ALLEGEDLY	DW RESPONSE
EVIDENCE	
	immaterial, lacks foundation and is
	otherwise objectionable. See DW's
	Evidentiary Objections.
18. Depending upon the contest, the	DISPUTED. Derby Wars' fantasy
players must select horses in 6 to 10	contests usually have a minimum of six
different races running at various race	contest races and can have a maximum
tracks, including Plaintiffs' tracks.	of up to fifteen contest races. (Midland
	Decl. ¶ 10; Opp. Midland Decl. ¶ 23.)
Ellis Dec., ¶ 5.	Further, a player in a Derby Wars'
	fantasy contest is not required to select
	a horse in all of the races. (Opp.
	Midland Decl. ¶ 23.) In addition, Derby
	Wars' fantasy contests include contest
	races at various race tracks, including
	Plaintiffs' race tracks, but contests races
	at Plaintiffs' tracks comprise less than
	25% of the total contests in a given
	year. (Midland Decl. ¶¶ 10, 24.)
	DISPUTED also because it lacks
	foundation and is otherwise
	objectionable. See DW's Evidentiary
	Objections.
19. In the contests, "the scores are	DISPUTED. Contest point scores are
calculated according to the actual	calculated based on a combination of
payouts at actual race tracks", and are	actual payouts at actual race tracks, as
	18. Depending upon the contest, the players must select horses in 6 to 10 different races running at various race tracks, including Plaintiffs' tracks. Ellis Dec., ¶ 5.

1 2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	based upon the actual payoff amounts on	well as proprietary adjustments set by
5	real horse races at real race tracks,	Derby Wars to create maximum point
6	including Plaintiffs' tracks.	scores. (Midland Decl. ¶ 11.) The
7		proprietary adjustments were designed
8	Ellis Dec., ¶ 8; and Midland Depo.,	to increase the skill required to win the
9	180:16-181:21.	contest and to lessen the impact of any
10		"luck" in selecting a long shot winner
11		of a particular race. (Midland Decl. ¶
12		11.) The winner of a contest is the
13		player with the highest aggregate total
14		point score for all of the contest races,
15		and the winning score is not based on
16		the results of any given race, and is not
17		based on the single performance of any
18		horse in a single race. (Midland Decl.
19		¶¶ 11-12; Opp. Midland Decl. ¶ 17.)
20	20. The scores are calculated in dollars.	DISPUTED. The fantasy contests are
21		scored in "points" or in "mythical
22	Midland Depo., 136:9-10; 156:4-6.	dollars" which have no value other than
23		creating a ranking on a leaderboard for
24		the contests in progress. (Midland Dep.
25		at 134:6-135:20; Midland Decl. ¶ 11.)
26	21. The player with the biggest bankroll	DISPUTED. The player with the most
27	(the most winnings) at the end of the	points at the end of the contest will
28 LPS &	contest, wins the "prize."	score in first place on the leaderboard DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4		and win the first-place prize. (Midland
5	Midland Depo., 180:12-22.	Dep. at 175:11-176:10, 180:12-14;
6	1 /	Midland Decl. ¶ 12; Opp. Midland
7		Decl. ¶ 18.) The winning score is not
8		based on the results of any given race,
9		and is not based on the single
10		performance of any horse in a single
11		race. (Midland Decl. ¶¶ 11-12; Opp.
12		Midland Decl. ¶ 17.) DISPUTED also
13		because the "fact" mischaracterizes Mr.
14		Midland's testimony.
15	22. In a "lockdown" contest, all	DISPUTED in part. In a "lockdown"
16	selections must be made before the post	contest, players may make selections up
17	time of the first race.	until the Derby Wars clock counts down
18		to 0:00, which is typically between 30
19	Midland Depo., 132:20-25; 211:1-4;	and 60 seconds before the first race of
20	Ellis Dec., ¶ 9.	the contest starts. (Midland Decl. ¶ 20;
21		Opp. Midland Decl. ¶ 25; Midland Dep.
22		at 132:23-25.)
23	23. In an "open" contest, called a	DISPUTED in part. In an "open"
24	"bullet" contest on the Derby Wars	contest, players may make selections
25	Website, the players must select a horse	for each race up until the time when the
26	in each race no later than one minute	Derby Wars clock counts down to 0:00,
27	before post time of that race.	typically between 30 and 60 seconds
28 LPS &		before the race starts. (Midland Decl. ¶ DEFENDANT HORSE RACING LABS, LLC'S

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$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	Midland Depo., 133:1-8.; Ellis Dec., ¶	19; Opp. Midland Decl. ¶ 26; Midland
5		Dep. at 133:1-8.)
6	24. Defendant also offers "high stakes"	DISPUTED in part. Derby Wars
7	contests for up to \$300,000, with a	admits this is one of dozens of different
8	\$2,200 entry fee.	fantast contests it offers. However, it
9		offers many other types of contests as
10	Ellis Dec., ¶ 7.	well. Moreover, other fantasy sports
11		contest sites – including Horse
12		Tourneys and Bet America – offer
13		contests with similar fixed entry fees
14		and prizes. (Opp. Midland Decl. ¶¶ 28-
15		34.) DISPUTED also because it lacks
16		foundation and is otherwise
17		objectionable. See DW's Evidentiary
18		Objections.
19	25. Derby Wars offers about 150	DISPUTED in part. Derby Wars
20	contests per day on average.	admits that it offers, on average, about
21		150 contests each day. However, other
22	Midland Depo., 131:17-22.	fantasy contest sites also offers
23		hundreds of contests, on average, a day.
24		For example, on March 31, 2017, Horse
25		Tourneys offered 182 contests on its
26		website. (Opp. Midland Decl. ¶ 29.)
27		DISPUTED also because the "fact" is
28		immaterial.

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4	26. In agreements with third parties,	DISPUTED. Mr. Midland testified at
5	Defendant even refers to its players as	deposition that the term "bettors," as
6	"bettors."	used in these agreements, referred to
7		simulcast customers of the race tracks,
8	Ellis Dec., ¶ 10; Exhibit 6, p. 2, "Exhibit	which did not and does not apply to
9	5;" Ellis Dec., ¶ 11, Exhibit 7, p. 2,	Derby Wars or its customers. (Midland
10	"Exhibit 5;", Ellis Dec., ¶12, Exhibit 8,	Dep. at 241:4-244:2.) Mr. Midland also
11	p. 2, "Exhibit 5."	testified that the use of the term
12		"bettors" was mistakenly included in
13		these agreements, as these agreements
14		(which are not in dispute in this case)
15		were revised from sample agreements
16		given to Derby Wars by Hawthorne
17		Race Course. (Midland Dep. at 241:4-
18		244:2.) DISPUTED also because it
19		lacks foundation and is otherwise
20		objectionable. See DW's Evidentiary
21		Objections.
22	27. A player is awarded points on the	DISPUTED. Players in Derby Wars'
23	same basis as if he had placed a \$2 bet at	contests are awarded points according
24	the racetrack, subject to adjustment for	to the actual track payouts of the sum of
25	maximum payouts.	a \$2 win and a \$2 place mythical wager,
26		or a \$2 win, \$2 place and a \$2 show
27	Midland Depo., 134:6-135:5.	mythical wager, depending on the
28		contest, subject to Derby Wars'
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		proprietary adjustments for maximum
5		point scoring in any one category.
6		(Midland Dep. at 134:6-135:20;
7		Midland Decl. ¶ 11; Opp. Midland
8		Decl. ¶ 17.) The proprietary
9		adjustments are designed to increase the
10		skill required to win the contest and to
11		lessen the impact of any "luck" in
12		selecting a long shot winner in a
13		particular race. (Midland Decl. ¶ 11.)
14		Further, unlike parimutuel wagering,
15		Derby Wars' fantasy contests involve
16		multiple contest races (six to fifteen,
17		depending on the contest) to accumulate
18		a point score, and involve contest
19		strategies that are unique and different
20		from parimutuel wagering on a single
21		horse race. (Opp. Midland Decl. ¶ 14;
22		Heeb Report ¶¶ 18, 20.)
23	28. For instance, if a horse would pay	DISPUTED. For this example to be
24	\$6.40, the player is awarded 6.40 points.	valid, it would have to be either that the
25		contestant selected: (a) a horse that
26	Midland Depo., 135:18-136:10.	finished third and was awarded 6.40
27		points for show, (b) a horse that won
28		and was awarded a combination of 2.20
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

PLAINTIFFS' ALLEGEDLY	DW RESPONSE
UNCONTROVERTED FACTS AND	DW RESTONSE
EVIDENCE	to win, 2.10 to place and 2.10 to show,
	or (c) a horse that finished second and
	was awarded the exact combination
	needed to reach exactly 6.4 points from
	a combination of (i) between 4.30 and
	2.10 points to place and (ii) between
	2.10 and 4.30 points to show. (Opp.
	Midland Decl. ¶ 17.) Also, Plaintiffs'
	hypothetical does not address situations
	where Derby Wars' proprietary
	adjustments would be triggered; in that
	case, the player would be awarded
	fewer points than the mythical payout at
	a track. (Midland Decl. ¶ 11.)
	DISPUTED also because it is an
	incomplete hypothetical.
29. Derby Wars uses "points or dollars	DISPUTED. The leaderboard in Derby
interchangeably."	Wars' contests is based on points
	earned in contest races. The points
Midland Depo., 136:6-10.	allocated to each player are based on
	one point per mythical dollar awarded
	in the contest, which has no value other
	than scoring the contest. (Midland Dep.
	at 134:6-135:20; Midland Decl. ¶¶ 11,
	15.) DISPUTED also because it DEFENDANT HORSE RACING LABS, LLC'S
	29. Derby Wars uses "points or dollars interchangeably."

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		mischaracterizes Mr. Midland's
5		testimony.
6	30. The player has no influence over the	DISPUTED in part. A contest player
7	actual results of the horse race; at the	does have influence over the results of
8	time when the player enters a contest, it	the fantasy contest. Derby Wars'
9	is uncertain as to which horse will win	contests involve intra-game and contest
10	the race.	strategies that are unique to Derby
11		Wars' fantasy contests and are not
12	Midland Depo., 177:21-178:8.	present in parimutuel wagering. (Heeb
13		Report ¶¶ 10-22, 31; Midland Decl. ¶
14		22; Opp. Midland Decl. ¶ 14.) For
15		example, Derby Wars' contests involve
16		the skill of adjusting selections during
17		the game to take best advantage of the
18		relative probabilities of winning;
19		evaluating opponents to determine their
20		tendencies and relative weaknesses; and
21		anticipating the overall slate of races to
22		predict a winning score. (Heeb Report
23		¶¶ 14-16, 32-35.) Moreover, while the
24		outcome of a given race may be
25		affected in part by chance, players in
26		Derby Wars' contests with superior
27		skill consistently outperform less
28		skillful players. (Heeb Report ¶¶ 17-

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4		19.) Thus, a Derby Wars' contest
5		player has influence over the outcome
6		of the contests. (Heeb Report ¶¶ 10-22;
7		Opp. Midland Decl. ¶ 14.) Further, the
8		winner of a Derby Wars' fantasy
9		contest is the player with the highest
10		aggregate total point score for all of the
11		contest races (six to fifteen races,
12		depending on the contest), and the
13		winning score is not based on the
14		results of any given race, and is not
15		based on the single performance of any
16		horse in a single race. (Midland Decl.
17		¶¶ 12-16; Opp. Midland Decl. ¶ 17;
18		Heeb Report ¶¶ 10-22.) Derby Wars
19		does not dispute that a contest player
20		has no influence over how the player's
21		horse ultimately performs in a race.
22	31. The winner of the contest will be	DISPUTED in part. A player who wins
23	determined by future events.	a Derby Wars' fantasy contest is
24		determined by the skill with which the
25	Midland Depo., 178:9-13.	player plays the fantasy contest, which
26		is dependent on a number of intra-game
27		and contest strategies not present in
28		traditional pari-mutuel wagering.
LPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DW KEST ONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	EVIDENCE	(Heeb Report ¶¶ 10-22, 31; Opp.
5		Midland Decl. ¶ 14.) For example,
6		Derby Wars' contests involve the skill
7		•
8		of adjusting selections during the game
9		to take best advantage of the relative
		probabilities of winning; evaluating
10		opponents to determine their tendencies
11		and relative weaknesses; and
12		anticipating the overall slate of races to
13		predict a winning score. (Heeb Report
14		¶¶ 14-16, 32-35.) Moreover, while the
15		outcome of a given race may be
16		affected in part by chance, players in
17		Derby Wars' contests with superior
18		skill consistently outperforms less
19		skillful players. (Heeb Report ¶¶ 17-
20		19.) Further, the winner of a Derby
21		Wars' fantasy contest is the player with
22		the highest aggregate total point score
23		for all of the contest races (six to fifteen
24		races, depending on the contest), and
25		the winning score is not based on the
26		results of any given race, and is not
27		based on the single performance of any
28		horse in a single race. (Midland Dep. at
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		21:12-22:8, 69:14-19, 130:11-131:4,
5		136:22-137:4, 138:9-139:20, 141:16-25.
6		198:7-199:14; Midland Decl. ¶¶ 11, 22;
7		Opp. Midland Decl. ¶ 17.) Winners
8		will be determines from players that
9		have made contest selections prior to
10		the Derby Wars' clock countdown.
11		Derby Wars does not dispute that a
12		contest player has no influence over
13		how the player's horse ultimately
14		performs in a race. DISPUTED also
15		because it mischaracterizes Mr.
16		Midland's testimony and is vague and
17		ambiguous.
18	32. Many of the races used in the	DISPUTED. Mr. Midland testified that
19	contests take place at Plaintiffs' race	only some of the contest races used in
20	tracks in California, Florida, Maryland	Derby Wars' contests included races at
21	and Oregon.	Plaintiffs' tracks. (Midland Dep. at
22		180:12-181:21.) Derby Wars' fantasy
23	Midland Depo., 180:12-181:21.	contest races at Plaintiffs' race tracks,
24		comprise less than 25% of all contests
25		in a given year. (Midland Decl. ¶ 24.)
26		DISPUTED also because it
27		mischaracterizes Mr. Midland's
28 ELPS &		testimony and is vague and ambiguous.

1	DI AINTENDES AL LEGEDIA.	
	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4	33. On March 16,2017, in head-to-head	DISPUTED that out of the 142 contests
5	contests alone, Defendant offered 24	completed on March 16, 2017, 24 of
6	contests using only races being run that	them included head-to-head contests
7	same day at Plaintiff's Gulfstream Park.	with races at Gulfstream. (Opp.
8		Midland Decl. ¶ 35.) DISPUTED also
9	Ellis Dec., ¶ 5.	because it is immaterial, lacks
10		foundation, and is otherwise
11		objectionable. See DW's Evidentiary
12		Objections.
13	34. The entry fees ranged from \$11 to	DISPUTED in part. The amount of the
14	\$799 per player, and the prizes ranged	fixed entry fee and predetermined prize
15	from \$20 to \$1500.	can vary from contest to contest. (Opp.
16		Midland Decl. ¶ 24.) In addition, other
17	Ellis Dec., ¶ 5.	fantasy sports contest sites – including
18		Horse Tourneys and Bet America –
19		offer contests with similar fixed entry
20		fees and prizes. For example, on March
21		31, 2017, Horse Tourneys advertised
22		numerous head-to-head tournaments,
23		including head-to-head contests using
24		Plaintiffs' tracks with fixed entry fees
25		of up to \$795 and for cash prizes of up
26		to \$1,500. (Opp. Midland Decl. ¶ 28.)
27		DISPUTED also because it is
28		immaterial, lacks foundation and is

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1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		otherwise objectionable. See DW's
5		Evidentiary Objections.
6	35. That same day, Defendant offered 26	DISPUTED. Out of the 142 contests
7	head-to-head contests using only races	completed on March 16, 2017, 12 of
8	being run that day at Plaintiffs Santa	them included head-to-head contests
9	Anita Park Track.	with races at Santa Anita. (Opp.
10		Midland Decl. ¶ 36.) DISPUTED also
11	Ellis Dec., ¶ 5.	because it is immaterial, lacks
12		foundation and is otherwise
13		objectionable. See DW's Evidentiary
14		Objections.
15	36. The entry fees ranged from \$11 to	DISPUTED. The fixed entry fees and
16	\$799 per player, and the prizes ranged	predetermined prize amounts listed for
17	from \$20 to \$1500.	Derby Wars' fantasy contests using
18		contest races at Santa Anita is not
19	Ellis Dec., ¶ 5.	accurate. (Opp. Midland Decl. ¶ 36.)
20		For example, fixed entry fees for head-
21		to-head contests that used races at Santa
22		Anita ranges from \$11 to \$430.
23		Further, the amount of the fixed entry
24		fee and predetermined prize can vary
25		from contest to contest. (Opp. Midland
26		Decl. ¶ 24.) Moreover, other fantasy
27		sports contest sites – including Horse
28 ELPS &		Tourneys and Bet America – offer

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LOS ANGELES

PLAINTIFFS' ALLEGEDLY	DW RESPONSE
UNCONTROVERTED FACTS AND	
EVIDENCE	
	contests with similar fixed entry fees
	and prizes. For example, on March 31,
	2017, Horse Tourneys advertised
	numerous head-to-head tournaments,
	including head-to-head contests using
	Plaintiffs' tracks with fixed entry fees
	of up to \$795 and for cash prizes of up
	to \$1,500. (Opp. Midland Decl. ¶ 28.)
	DISPUTED also because it is
	immaterial, lacks foundation and is
	otherwise objectionable. See DW's
	Evidentiary Objections.
37. On March 16, 2017, Defendant also	DISPUTED. Out of the 142 contests
offered 11 head-to-head contests using	completed on March 16, 2017, one of
races run at two of Plaintiffs' race tracks	them included a head-to-head contest
- Santa Anita Park and Golden Gate	with races at Santa Anita and Golden
Fields.	Gate. (Opp. Midland Decl. ¶ 37.)
	DISPUTED also because it is
Ellis Dec., ¶ 5.	immaterial, lacks foundation and is
	otherwise objectionable. See DW's
	Evidentiary Objections.
38. For these races, the entry fees	DISPUTED in part. The amount of the
ranged from \$11 to \$430 per player, and	fixed entry fee and predetermined prize
the prizes ranged from \$20 to \$800.	can vary from contest to contest. (Opp.
	Midland Decl. ¶ 24.) Other fantasy DEFENDANT HORSE RACING LABS, LLC'S
	37. On March 16, 2017, Defendant also offered 11 head-to-head contests using races run at two of Plaintiffs' race tracks - Santa Anita Park and Golden Gate Fields. Ellis Dec., ¶ 5.

PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
ALLEGED SUPPORTING EVIDENCE	
Ellis Dec., ¶ 5.	sports contest sites – including Horse
	Tourneys and Bet America – offer
	contests with similar fixed entry fees
	and prizes. For example, on March 31,
	2017, Horse Tourneys advertised
	numerous head-to-head tournaments,
	including head-to-head contests using
	Plaintiffs' tracks with fixed entry fees
	of up to \$795 for eash prizes of up to
	\$1,500. (Opp. Midland Decl. ¶ 28.)
	DISPUTED also because it is
	immaterial, lacks foundation and is
	otherwise objectionable. See DW's
	Evidentiary Objections.
39. The determination of the winner of	DISPUTED in part. A contest player
Derby Wars' contests is based upon the	does have influence over the results of
outcome of future events (the races), and	the fantasy contest. A player who wins
the player is not a participant in, and has	a Derby Wars' contests is determined
no control over, this outcome.	by the skill with which the player plays
	the fantasy contests, and is dependent
Midland Depo., 211:5-17; Shutty Depo.,	on a number of intra-game and contest
66:4-11.	strategies not present in traditional pari-
	mutuel wagering. (Heeb Report ¶¶ 10-
	22, 31; Opp. Midland Decl. ¶ 17.) For
	example, Derby Wars' contests involve DEFENDANT HORSE RACING LABS, LLC'S
	Ellis Dec., ¶ 5. 39. The determination of the winner of Derby Wars' contests is based upon the outcome of future events (the races), and the player is not a participant in, and has no control over, this outcome. Midland Depo., 211:5-17; Shutty Depo.,

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4		the skill of adjusting selections during
5		the game to take best advantage of the
6		relative probabilities of winning;
7		evaluating opponents to determine their
8		tendencies and relative weaknesses; and
9		anticipating the overall slate of races to
10		predict a winning score. (Heeb Report
11		¶¶ 14-16, 32-35.) Moreover, while the
12		outcome of a given race may be
13		affected in part by chance, players in
14		Derby Wars' contests with superior
15		skill consistently outperform less
16		skillful players. (Heeb Report ¶¶ 17-
17		19.) Thus, a Derby Wars' contest
18		player has influence over the outcome
19		of the contest. (Opp. Midland Decl. ¶
20		14; Heeb Report ¶¶ 10-22.) Further, the
21		winner of a Derby Wars' fantasy
22		contest is the player with the highest
23		aggregate total point score for all of the
24		contest races (six to fifteen races,
25		depending on the contest), and the
26		winning score is not based on the
27		results of any given race, and is not
28 ELPS &		based on the single performance of any DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DIVILLATORION
3	ALLEGED SUPPORTING EVIDENCE	
4		horse in a single race. (Midland Dep. at
5		21:12-22:8, 69:14-19, 130:11-131:4,
6		136:22-137:4, 138:9-139:20, 141:16-25.
7		198:7-199:14; Midland Decl. ¶¶ 12-16;
8		Opp. Midland Decl. ¶ 17; Heeb Report
9		¶¶ 10-22.) Derby Wars does not dispute
10		that a contest player has no influence
11		over how the player's horse ultimately
12		performs in a race.
13	40. Unlike other sports, horseracing is	DISPUTED. In addition to wagering,
14	almost exclusively funded by wagering.	revenues from horse racing also include
15		attendance revenue, food and beverage
16	Declaration of Scott J. Daruty ("Daruty	revenues, fees for the transmission of
17	Dec."), ¶¶ 8, 10	television signals of the races, and
18		television and sponsorship revenues.
19		(Opp. Midland Decl. ¶ 42.)
20		DISPUTED also because it is
21		immaterial, lacks foundation and is
22		otherwise objectionable. See DW's
23		Evidentiary Objections.
24	41. The total amount wagered is the	DISPUTED in part. Derby Wars
25	"handle."	disputes that the entry fees for its
26		fantasy contests are "wagers" or that the
27	Daruty Dec., ¶ 10.	total of such fees are appropriately
28 ELPS &		referred to as "handle." Derby Wars DEFENDANT HORSE RACING LABS, LLC'S

1 2 3	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND ALLEGED SUPPORTING EVIDENCE	DW RESPONSE
4		does not dispute that the total amount
5		wagered on horse races through the
6		parimutuel wagering system is referred
7		to in the industry as "handle." Under
8		their licenses, Plaintiffs are only entitled
9		to engage in parimutuel wagering at
10		their tracks. (Kanny Decl. ¶ 4, Ex. C
11		("Ritvo Dep.") at 52:6-55:23; Amended
12		Declaration of Maura K. Gierl in
13		Support of Defendant Horse Racing
14		Labs, LLC's Motion for Summary
15		Judgment ("Gierl Decl.") ² ¶ 3, Ex. B
16		("Rogers Dep.") at 59:22-60:23; Daruty
17		Dep. at 375:10-377:16, 382:11-388:4.)
18		Plaintiffs have already admitted that
19		Derby Wars' contests are non-
20		parimutuel. (Daruty Dep. at 439:5-
21		441:16.) The Pennsylvania Horse
22		Racing Commission has also
23		determined that Derby Wars' fantasy
24		contests are not parimutuel wagering.

Due to Plaintiffs' extensive de-designations of previously designated "confidential" information, and agreements between the parties relating to the public filing of other testimony and documents in support of DW's Opposition, DW has filed an *Amended* Declaration of Maura K. Gierl, which supersedes its March 20, 2017 Declaration of Maura K. Gierl, and attaches for filing on the public record the evidence, upon which DW relies in its Motion and Opposition, that is no longer "confidential." (*See* Notice of Withdrawal filed concurrently herewith).

DEFENDANT HORSE RACING LABS, LLC'S STATEMENT OF GENUINE DISPUTES OF

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1		
1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		(Opp. Midland Decl. ¶ 11, Ex. A.)
5		DISPUTED also because it is
6		immaterial, lacks foundation and is
7		otherwise objectionable. See DW's
8		Evidentiary Objections.
9	42. By law, approximately eighty	DISPUTED in part. Derby Wars
10	percent of the handle is returned to the	disputes that the entry fees for its
11	patrons who placed winning wagers.	fantasy contests are "wagers" or that the
12		total of such fees are appropriately
13	Daruty Dec., ¶ 10.	referred to as "handle." Derby Wars
14		does not dispute that approximately
15		eighty percent of the parimutuel handle
16		is returned to those who place pari-
17		mutuel wagers on horse races. Under
18		their licenses, Plaintiffs are only entitled
19		to engage in parimutuel wagering at
20		their tracks. (Ritvo Dep. at 52:6-55:23;
21		Rogers Dep. at 59:22-60:23; Daruty
22		Dep. at 375:10-377:16, 382:11-388:4.)
23		Plaintiffs have already admitted that
24		Derby Wars' contests are non-
25		parimutuel. (Daruty Dep. at 439:5-
26		441:16.) The Pennsylvania Horse
27		Racing Commission has also
28		determined that Derby Wars' fantasy

4		
1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		contests are not parimutuel wagering.
5		(Opp. Midland Decl. ¶ 11, Ex. A.)
6		DISPUTED also because it is
7		immaterial, lacks foundation, calls for a
8		legal conclusion and is otherwise
9		objectionable. See DW's Evidentiary
10		Objections.
11	43. The remaining approximately twenty	DISPUTED in part. Derby Wars
12	percent is known as the "takeout," the	disputes that the entry fees for its
13	amount initially retained by the race	fantasy contests are "wagers," that the
14	track.	total of such fees are appropriately
15		referred to as "handle," or that Derby
16	Daruty Dec., ¶ 10.	Wars' profits, if any, from its contests
17		are appropriately referred to as the
18		"takeout." Derby Wars does not
19		dispute that the "take-out" on
20		parimutuel handle from parimutuel
21		wagers place on horse races is about
22		twenty percent. Under their licenses,
23		Plaintiffs are only entitled to engage in
24		parimutuel wagering at their tracks.
25		(Ritvo Dep. at 52:6-55:23; Rogers Dep.
26		at 59:22-60:23; Daruty Dep. at 375:10-
27		377:16, 382:11-388:4.) Plaintiffs have
28		already admitted that Derby Wars'

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	D W TELET OF ISE
3	ALLEGED SUPPORTING EVIDENCE	
4	EVIDENCE	contests are non-parimutuel. (Daruty
5		Dep. at 439:5-441:16.) The
6		, , , , , , , , , , , , , , , , , , ,
7		Pennsylvania Horse Racing
8		Commission has also determined that
		Derby Wars' fantasy contests are not
9		parimutuel wagering. (Opp. Midland
10		Decl. ¶ 11, Ex. A.) DISPUTED also
11		because it is immaterial, lacks
12		foundation, calls for a legal conclusion
13		and is otherwise objectionable. See
14		DW's Evidentiary Objections.
15	44. The takeout is then divided, pursuant	DISPUTED in part. Derby Wars
16	to contract and law, among the	disputes that the entry fees for its
17	stakeholders in the form of commissions	fantasy contests are "wagers," that the
18	paid to the racetracks; purses paid to the	total of such fees are appropriately
19	owners, trainers and jockeys of the	referred to as "handle," or that Derby
20	horses in the race; taxes paid to the state;	Wars' profits, if any, from its contests
21	and funds dedicated to equine research,	are appropriately referred to as the
22	workers' compensation funds, worker	"takeout." Derby Wars does not
23	health and welfare, etc., that benefit the	dispute that the "take-out" from pari-
24	backstretch workers.	mutuel handle from pari-mutuel wagers
25		placed on horse races is often divided.
26	Daruty Dec., ¶ 10.	Under their licenses, Plaintiffs are only
27		entitled to engage in parimutuel
28		wagering at their tracks. (Ritvo Dep. at

1 2 3	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND ALLEGED SUPPORTING EVIDENCE	DW RESPONSE
4		52:6-55:23; Rogers Dep. at 59:22-
5		60:23; Daruty Dep. at 375:10-377:16,
6		382:11-388:4.) Plaintiffs have already
7		admitted that Derby Wars' contests are
8		non-parimutuel. (Daruty Dep. at 439:5-
9		441:16.) The Pennsylvania Horse
10		Racing Commission has also
11		determined that Derby Wars' fantasy
12		contests are not parimutuel wagering.
13		(Opp. Midland Decl. ¶ 11, Ex. A.)
14		DISPUTED also because it is
15		immaterial, lacks foundation, calls for a
16		legal conclusion and is otherwise
17		objectionable. See DW's Evidentiary
18		Objections.
19	45. The type of wagering available on	DISPUTED in part. Derby Wars
20	horseracing includes "Win" (picking a	disputes that the entry fees for its
21	horse to finish first in the race), "Place"	fantasy contests are "wagers." Derby
22	(picking a horse to finish first or second	Wars does not dispute that there are
23	in the race) and "Show" (picking a horse	various types of parimutuel wagers
24	to finish first, second or third in the	placed on horse races at race tracks.
25	race).	Under their licenses, Plaintiffs are only
26		entitled to engage in parimutuel
27	Daruty Dec., ¶ 11.	wagering at their tracks. (Ritvo Dep. at
28 .ps &		52:6-55:23; Rogers Dep. at 59:22-

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4		
1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		60:23; Daruty Dep. at 375:10-377:16,
5		382:11-388:4.) Plaintiffs have already
6		admitted that Derby Wars' contests are
7		non-parimutuel. (Daruty Dep. at 439:5-
8		441:16.) The Pennsylvania Horse
9		Racing Commission has also
10		determined that Derby Wars' fantasy
11		contests are not parimutuel wagering.
12		(Opp. Midland Decl. ¶ 11, Ex. A.)
13		DISPUTED also because it is
14		immaterial, lacks foundation, calls for a
15		legal conclusion and is otherwise
16		objectionable. See DW's Evidentiary
17		Objections.
18	46. Any type of wager other than Win,	DISPUTED in part. Derby Wars
19	Place or Show is called an exotic wager.	disputes that the entry fees for its
20		fantasy contests are "wagers." Derby
21	Daruty Dec., ¶ 11.	Wars does not dispute that there are
22		various types of parimutuel wagers
23		placed on horse races at race tracks.
24		Under their licenses, Plaintiffs are only
25		entitled to engage in parimutuel
26		wagering at their tracks. (Ritvo Dep. at
27		52:6-55:23; Rogers Dep. at 59:22-
28		60:23; Daruty Dep. at 375:10-377:16,

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4		382:11-388:4.) Plaintiffs have already
5		admitted that Derby Wars' contests are
6		non-parimutuel. (Daruty Dep. at 439:5-
7		441:16.) The Pennsylvania Horse
8		Racing Commission has also
9		determined that Derby Wars' fantasy
10		contests are not parimutuel wagering.
11		(Opp. Midland Decl. ¶ 11, Ex. A.)
12		DISPUTED also because it is
13		immaterial, lacks foundation, calls for a
14		legal conclusion and is otherwise
15		objectionable. See DW's Evidentiary
16		Objections.
17	47. Exotic wagers include the "Daily	DISPUTED in part. Derby Wars
18	Double" (picking the winning horse in	disputes that the entry fees for its
19	two consecutive races), "Exacta"	fantasy contests are "wagers." Derby
20	(picking the first two horses to finish in a	Wars does not dispute that there are
21	single race in the exact order), "Trifecta"	various types of parimutuel wagers
22	(picking the first three horses to finish in	placed on horse races at race tracks.
23	a single race in the exact order), "Pick	Under their licenses, Plaintiffs are only
24	Three" (picking the winning horse in	entitled to engage in parimutuel
25	three consecutive races), "Pick Four"	wagering at their tracks. (Ritvo Dep. at
26	(picking the winning horse in four	52:6-55:23; Rogers Dep. at 59:22-
27	consecutive races), and a "Pick Six"	60:23; Daruty Dep. at 375:10-377:16,
28 LPS &	(picking the winning horse in six	382:11-388:4.) Plaintiffs have already DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DW RESTONSE
3	ALLEGED SUPPORTING EVIDENCE	
4	consecutive races.)	admitted that Derby Wars' contests are
5	,	non-parimutuel. (Daruty Dep. at 439:5-
6	Daruty Dec., ¶ 11.	441:16.) The Pennsylvania Horse
7		Racing Commission has also
8		determined that Derby Wars' fantasy
9		contests are not parimutuel wagering.
10		(Opp. Midland Decl. ¶ 11, Ex. A.)
11		DISPUTED also because it is
12		immaterial, lacks foundation, calls for a
13		legal conclusion and is otherwise
14		objectionable. <i>See</i> DW's Evidentiary
15		Objections.
16	48. Defendant concedes that all of these	DISPUTED in part. Derby Wars
17	(Win, Place, Show and exotic wagers)	disputes that the entry fees for its
18	are indeed wagers when placed at the	fantasy contests are "wagers." Derby
19	racetrack.	Wars does not dispute that there are
20		various types of parimutuel wagers
21	Midland Depo., 201:23-203:18; Shutty	placed on horse races at race tracks.
22	Depo., 91:2-7; 99:23-100:3; 102:17-19.	Under their licenses, Plaintiffs are only
23		entitled to engage in parimutuel
24		wagering at their tracks. (Ritvo Dep. at
25		52:6-55:23; Rogers Dep. at 59:22-
26		60:23; Daruty Dep. at 375:10-377:16,
27		382:11-388:4.) Plaintiffs have already
28 ELPS &		admitted that Derby Wars' contests are DEFENDANT HORSE RACING LABS, LLC'S

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1 2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	DW RESPONSE
3	EVIDENCE	
4		non-parimutuel. (Daruty Dep. at 439:5-
5		441:16.) The Pennsylvania Horse
6		Racing Commission has also
7		determined that Derby Wars' fantasy
8		contests are not parimutuel wagering.
9		(Opp. Midland Decl. ¶ 11, Ex. A.)
10		DISPUTED also because it is
11		immaterial, lacks foundation, calls for a
12		legal conclusion and is otherwise
13		objectionable. See DW's Evidentiary
14		Objections.
15		,

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Manatt, Phelps & Phillips, LLP Attorneys at Law Los Angeles

"ISSUE 2: Defendant is operating an off-track betting system under Section 3002(7) of the IHA."

DW hereby incorporates its responses to Plaintiffs' Allegedly Uncontroverted Facts Nos. 1-48.

PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND ALLEGED SUPPORTING EVIDENCE	DW RESPONSE
49. Historically, wagering on horses	DISPUTED in part. Derby Wars
only took place live (at the actual track	disputes that the entry fees for its
where the race was being run), such that	fantasy contests are "wagers." Derby
bettors had to attend the race to place a	Wars does not dispute the history of
wager.	parimutuel wagering on horse races at
	race tracks. DISPUTED also because it
Daruty Dec., ¶ 12.	lacks foundation and is otherwise
	objectionable. See DW's Evidentiary
	Objections.
50. Eventually, off-track betting	DISPUTED in part. Derby Wars
facilities opened, which accepted wagers	disputes that the entry fees for its
at locations other than the track where	fantasy contests are "wagers." Derby
the race was being run.	Wars does not dispute the history of
	parimutuel wagering on horse races at
Daruty Dec., ¶ 12.	race tracks. DISPUTED also because it
	lacks foundation and is otherwise
	objectionable. See DW's Evidentiary
	Objections.
51. In 1978, Congress enacted the IHA,	DISPUTED in part. Derby Wars
which was explicitly intended to	disputes that the entry fees for its

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1	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4	"regulate interstate commerce with	fantasy contests are "wagers" or
5	respect to wagering on horseracing." As	"wagering." Derby Wars does not
6	provided therein, no one "may accept an	dispute that Congress enacted the IHA
7	interstate off-track wager except as	in 1978. DISPUTED also because it
8	provided in" the IHA.	lacks foundation, calls for a legal
9		conclusion and is otherwise
10	Daruty Dec., ¶ 13.	objectionable. See DW's Evidentiary
11		Objections.
12	52. Defendant does not comply with the	DISPUTED in part. Derby Wars
13	IHA.	disputes that it is required to comply
14		with the IHA. Plaintiffs misstate Mr.
15	Midland Depo., Page 190, lines 16-24;	Midland's and Mr. Shutty's testimony.
16	Shutty Depo., 92:9-14.	Mr. Midland testified that the IHA
17		applies only to parimutuel wagering and
18		does not apply to Derby Wars' contests.
19		(Midland Dep. at 190:16-24.)
20		Likewise, Mr. Shutty testified that the
21		IHA does not apply to DerbyWars'
22		contests. (Opp. Kanny Decl. ¶ 6, Ex. E
23		("Shutty Dep.") at 92:9-14.) Plaintiffs
24		admit that the IHA applies to
25		parimutuel wagering only. (Ritvo Dep.
26		at 52:6-55:23, 66:1-12.) Plaintiffs also
27		concede that Derby Wars' contests are
28		non-parimutuel. (Daruty Dep. at

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4		439:5-441:16.) The Pennsylvania
5		Horse Racing Commission has also
6		determined that Derby Wars' fantasy
7		contests are not parimutuel wagering.
8		(Opp. Midland Decl. ¶ 11, Ex. A.)
9		Further, whether a person complies or is
10		required to comply with the IHA is a
11		legal conclusion.
12	53. From the late 1990's through today,	DISPUTED in part. Derby Wars
13	the industry has experienced much	disputes that it is required to comply
14	growth in the area of Advanced Deposit	with the IHA and/or that it must be an
15	Wagering ("ADW").	ADW. Derby Wars does not dispute
16		the history of ADWs. DISPUTED also
17	Daruty Dec., ¶ 14.	because it lacks foundation and is
18		otherwise objectionable. See DW's
19		Evidentiary Objections.
20	54. In ADW, a customer deposits funds	DISPUTED in part. Derby Wars
21	with a licensed, regulated	disputes that the entry fees for its
22	online/telephone wagering operator, and	fantasy contests are "wagers" or
23	then issues wagering instructions (via	"wagering," and that it must be an
24	telephone or internet) to that operator to	ADW. Derby Wars does not dispute
25	place a wager on a specific race using	that ADW licenses are required for
26	funds in the account.	parimutuel wagers, and that a licensed
27		ADW operator may only accept
28 ELPS &	Daruty Dec., ¶ 14.	parimutuel wagers. (Opp. Midland DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
3	ALLEGED SUPPORTING EVIDENCE	
4	E VID EI (OE	Decl. ¶ 8; Midland Decl. ¶¶ 50, 51, 53.)
5		Plaintiffs have already admitted that
6		Derby Wars' contests are non-
7		parimutuel. (Daruty Dep. at 439:5-
8		441:16.) The Pennsylvania Horse
9		Racing Commission has also
10		determined that Derby Wars' fantasy
11		contests are not parimutuel wagering.
12		(Opp. Midland Decl. ¶ 11, Ex. A.)
13		DISPUTED also because it lacks
14		foundation and is otherwise
15		objectionable. <i>See</i> DW's Evidentiary
16		Objections.
17	55. If the wager is successful, the	DISPUTED in part. Derby Wars
18	winning funds are deposited directly into	disputes that the entry fees for its
19	the customer's account.	fantasy contests are "wagers," and that
20		it must be an ADW. Derby Wars does
21	Daruty Dec., ¶ 14.	not dispute that ADW licenses are
22		required for parimutuel wagers, and that
23		a licensed ADW operator may only
24		accept parimutuel wagers. (Opp.
25		Midland Decl. ¶ 8; Midland Decl. ¶¶
26		50, 51, 53.) Plaintiffs have already
27		admitted that Derby Wars' contests are
28		non-parimutuel. (Daruty Dep. at 439:5-

1 2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING EVIDENCE	
4		441:16.) The Pennsylvania Horse
5		Racing Commission has also
6		determined that Derby Wars' fantasy
7		contests are not parimutuel wagering.
8		(Opp. Midland Decl. ¶ 11, Ex. A.)
9		DISPUTED also because it lacks
10		foundation and is otherwise
11		objectionable. See DW's Evidentiary
12		Objections.
13	56. The IHA only permits acceptance of	DISPUTED in part. Derby Wars
14	interstate wagers on horseraces by an	disputes that it is required to comply
15	entity (including an ADW operator),	with the IHA, that it must be an ADW,
16	which has obtained consent from, inter	and that Plaintiffs' consent (or that of
17	alia, the host racing association on	any other horse racing association) is
18	whose races such wagers are placed,	necessary for its fantasy contests.
19	such as Plaintiffs.	Derby Wars does not dispute that the
20		IHA applies to parimutuel wagering,
21	Daruty Dec., ¶ 16.	and that a licensed ADW operator may
22		only accept pari-mutuel wagers. (Ritvo
23		Dep. at 52:6-55:23, 66:1-12.) Plaintiffs
24		also concede that Derby Wars' contests
25		are non-parimutuel. (Daruty Dep. at
26		439:5-441:16.) The Pennsylvania
27		Horse Racing Commission has also
28		determined that Derby Wars' fantasy

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1	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4		contests are not parimutuel wagering.
5		(Opp. Midland Decl. ¶ 11, Ex. A.)
6		DISPUTED also because it lacks
7		foundation, calls for a legal conclusion
8		and is otherwise objectionable. See
9		DW's Evidentiary Objections.
10	57. It is customary in the industry for a	DISPUTED in part. Derby Wars
11	host racing association to grant the	disputes that it is required to comply
12	required consent only if it receives a	with the IHA, that it must be an ADW,
13	payment of money or other value from	and that Plaintiffs' consent (or that of
14	the entity accepting the wagers.	any other horse racing association) is
15		necessary for its fantasy contests.
16	Daruty Dec., ¶ 17.	Derby Wars does not dispute that the
17		IHA applies to parimutuel wagering,
18		and that a licensed ADW operator may
19		only accept parimutuel wagers. (Ritvo
20		Dep. at 52:6-55:23, 66:1-12.) Plaintiffs
21		also concede that Derby Wars' contests
22		are non-parimutuel. (Daruty Dep. at
23		439:5-441:16.) The Pennsylvania
24		Horse Racing Commission has also
25		determined that Derby Wars' fantasy
26		contests are not parimutuel wagering.
27		(Opp. Midland Decl. ¶ 11, Ex. A.)
28		DISPUTED also because it lacks

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1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		foundation and is otherwise
5		objectionable. See DW's Evidentiary
6		Objections.
7	58. Defendant has never been licensed as	DISPUTED in part. Derby Wars
8	an ADW.	disputes that it is required to comply
9		with the IHA and/or that is must be an
10	Midland Depo., 406:21-23.	ADW. Derby Wars does not accept
11		parimutuel wagers and thus no license
12		is required. (Midland Decl. ¶ 51.)
13		Plaintiffs also concede that Derby
14		Wars' contests are non-parimutuel.
15		(Daruty Dep. at 439:5-441:16.) The
16		Pennsylvania Horse Racing
17		Commission has also determined that
18		Derby Wars' fantasy contests are not
19		parimutuel wagering. (Opp. Midland
20		Decl. ¶ 11, Ex. A.) Derby Wars asked
21		the North Dakota Racing Commission
22		("NDRC") whether it needs to be
23		licensed to operate contests, and NDRC
24		advised that NDRC's ADW licenses do
25		not cover fantasy contests. (Midland
26		Decl. ¶ 53.) Derby Wars was also told
27		by the California Horse Racing Board
28		("CHRB") that the CHRB does not
ELPS &		DEFENDANT HORSE RACING LARS LLC'S

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1 2 3	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND ALLEGED SUPPORTING EVIDENCE	DW RESPONSE
4		grant licenses to operate contests.
5		(Midland Decl. ¶ 53.) Derby Wars does
6		not dispute that it has ever sought nor
7		received a lisence to become an ADW.
8		DISPUTED also because it is
9		immaterial.
10		

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Attorneys at Law
Los Angeles

"ISSUE 3: That Defendant is required to obtain the consent of Plaintiffs prior to accepting wagers on Plaintiffs' horseraces."

DW hereby incorporates its responses to Plaintiffs' Allegedly Uncontroverted Facts Nos. 1-58.

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6	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
7	ALLEGED SUPPORTING	
8	EVIDENCE	
9	59. Plaintiffs operate horse racing meets	UNDISPUTED.
10	at race tracks in California (Santa Anita	
11	Park and Golden Gate Fields), Florida	
12	(Gulfstream Park and Gulfstream Park	
13	West), Maryland (Pimlico and Laurel	
14	Park), and Oregon (Portland Meadows).	
15		
16	Daruty Dec., ¶ 7.	
17	60. Each Plaintiff is a Host Racing	DISPUTED because it lacks
18	Association within the meaning of the	foundation, calls for a legal conclusion,
19	IHA.	best evidence and is otherwise
20		objectionable. See Derby Wars'
21	Daruty Dec., ¶ 18.	Objections to Plaintiffs' Evidence.
22	61. Each Plaintiff has the approval of its	DISPUTED because it lacks
23	host State to conduct racing.	foundation, calls for a legal conclusion,
24		best evidence and is otherwise
25	Daruty Dec., ¶ 19.	objectionable. See Derby Wars'
26		Objections to Plaintiffs' Evidence.
27	62. Each Plaintiff has a written	DISPUTED. The Horseman's Group
28	agreement with its Horsemen's Group,	contracts produced in this case do not

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1	DI AINTHEEC ALLECEDI V	DW DECDONCE
2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING	
4	EVIDENCE	· · · · · · · · · · · · · · · · · · ·
	as required by the IHA.	specifically cover fantasy contests, and
5		Mr. Daruty has testified that it is the
6	Daruty Dec., ¶ 20.	Horsemen's Groups that ultimately
7		have the approval rights over
8		arrangements with fantasy contest sites.
9		(Opp. Kanny Decl. ¶ 4, Ex. C ("Opp.
10		Ritvo Dep.") at 200:6-204:24;
11		Declaration of Olivia M. Hardinge in
12		Support of DW's Opposition to
13		Plaintiffs' Motion for Partial Summary
14		Judgment ("Hardinge Decl.") ¶ 2, Ex.
15		A; Opp. Kanny Decl. ¶ 5, Ex. D ("Opp.
16		Daruty Dep.") at 48:1-12.) Also, the
17		Horsemen's Groups have the right to
18		approve Plaintiffs' simulcast
19		agreements, which prohibit ADWs
20		from using races at Plaintiffs' tracks in
21		contests. (Opp. Ritvo Dep. at 200:6-
22		204:24; Gierl Decl. ¶ 23, Ex. V; Opp.
23		Daruty Dep. at 271:16-272:1, 359:19-
24		23, Gierl Decl. ¶ 24, Ex. W (at § 2.a)
25		and ¶ 25, Ex. X (at § 1.d)). DISPUTED
26		also because it lacks foundation, calls
27		for a legal conclusion, best evidence
28		and is otherwise objectionable. See

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1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	
	ALLEGED SUPPORTING	
3	EVIDENCE	
4		Derby Wars' Objections to Plaintiffs'
5		Evidence.
6		
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MANATT, PHELPS & PHILLIPS, LLP
ATTORNEYS AT LAW
LOS ANGELES

"ISSUE 4: That Defendant is in violation of Section 3004(a) of the IHA, because it is accepting wagers on Plaintiff host racing associations' horseraces, without the consent of Plaintiffs."

DW hereby incorporates its responses to Plaintiffs' Allegedly Uncontroverted Facts Nos. 1-62.

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7	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	
8	ALLEGED SUPPORTING	
9	EVIDENCE	
10	63. No Plaintiff has ever provided	DISPUTEI
11	consent to Defendant to accept a wager	disputes that
12	on a race run at any of Plaintiffs' race	fantasy con
13	tracks.	"wagering,
14		(or that of a
15	Daruty Dec., ¶ 22.	association
16		off-track be
17		necessary f
18		Derby War
		Dlaintiffa f

D in part. Derby Wars at the entry fees for its ntests are "wagers" or "," and that Plaintiffs' consent any other horse racing n, horse racing commission or etting association) is for its fantasy contests. rs further disputes that Plaintiffs failed to consent to its fantasy contests for the more than four year period that Plaintiffs knew of, and did not object to, Derby Wars' contests, as Plaintiffs have known about Derby Wars' conduct since approximately September 2011. (Daruty Dep. at 141:14-147:22, 148:5-150:19, 152:16-154:16, 155:10-156:17, 156:23-158:15, 159:12-160:5, 160:10-161:24, 164:11-

DW RESPONSE

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1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND	DW KEST OTHER
3	ALLEGED SUPPORTING EVIDENCE	
4	EVIDENCE	167:10, 168:5-170:7, 171:3-24, 172:4-
5		173:19, 189:21-194:3, 393:11-395:2,
6		396:4-399:12; Rogers Dep. at 112:12-
7		113:25, 115:17-117:21, 118:8-119:22,
8		121:8-125:4, 126:8-12, 128:24-134:2,
9		135:13-23, 138:6-141:9, 144:2-146:16,
10		147:23-151:5, 152:20-153:1, 162:4-
11		164:19, 164:23-165:17, 166:23-167:7;
12		Ritvo Dep. at 122:16-124:18; Midland
13		Decl. ¶¶ 26-27, 38-39; Gierl Decl. ¶¶ 4-
14		13, 21, Exs. C-O, T.) In addition,
15		Derby Wars entered into a marketing
16		arrangement in for the 2015 race year
17		with one of Plaintiffs' tracks, Santa
18		Anita, whereby Santa Anita advertised
19		Derby Wars' fantasy horse racing
20		contests. (Midland Decl. ¶ 43, Ex. E, F;
21		Daruty Dep. at 247:14-248:3, 393:11-
22		395:2, 396:4-399:12.) No one from the
23		Plaintiffs asked Derby Wars to stop
24		using Plaintiffs' tracks in Derby Wars'
25		contests at any time prior to the lawsuit
26		being filed. (Daruty Dep. at 181:25-
27		, , , , , ,
28		182:21, 183:7-11, 185:23-186:2; Ritvo
ELPS &		Dep. at 145:6-14; Rogers Dep. at 173:1- DEFENDANT HORSE RACING LABS, LLC'S

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1		
1	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4		174:17, 179:12-180:15, 184:12-25,
5		192:12-19, 195:7-19, 198:22-200:16;
6		Gierl Decl. ¶ 14, Ex. M.) DISPUTED
7		also because it lacks foundation and is
8		otherwise objectionable. See DW's
9		Evidentiary Objections. Derby Wars
10		does not dispute that Plaintiffs have not
11		provided consent to Derby Wars "to
12		accept a wager on a race run at any of
13		Plaintiffs' race tracks."
14	64. No Plaintiff has ever provided	DISPUTED in part. Derby Wars
15	consent to Defendant to accept a wager	disputes that the entry fees for its
16	from a resident of the States of	fantasy contests are "wagers" or
17	California, Florida, Maryland or Oregon.	"wagering," and that Plaintiffs' consent
18		(or that of any other horse racing
19	Daruty Dec., ¶ 23.	association, horse racing commission or
20		off-track betting association) is
21		necessary for its fantasy contests.
22		Derby Wars further disputes that
23		Plaintiffs failed to consent to its fantasy
24		contests for the more than four year
25		period that Plaintiffs knew of, and did
26		not object to, Derby Wars' contests, as
27		Plaintiffs have known about Derby
28		Wars' conduct since approximately
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		September 2011. (Daruty Dep. at
5		141:14-147:22, 148:5-150:19, 152:16-
6		154:16, 155:10-156:17, 156:23-158:15,
7		159:12-160:5, 160:10-161:24, 164:11-
8		167:10, 168:5-170:7, 171:3-24, 172:4-
9		173:19, 189:21-194:3, 393:11-395:2,
10		396:4-399:12; Rogers Dep. at 112:12-
11		113:25, 115:17-117:21, 118:8-119:22,
12		121:8-125:4, 126:8-12, 128:24-134:2,
13		135:13-23, 138:6-141:9, 144:2-146:16,
14		147:23-151:5, 152:20-153:1, 162:4-
15		164:19, 164:23-165:17, 166:23-167:7;
16		Ritvo Dep. at 122:16-124:18; Midland
17		Decl. ¶¶ 26-27, 38-39; Gierl Decl. ¶¶ 4-
18		13, 21, Exs. C-O, T.) In addition,
19		Derby Wars entered into a marketing
20		arrangement in for the 2015 race year
21		with one of Plaintiffs' tracks, Santa
22		Anita, whereby Santa Anita advertised
23		Derby Wars' fantasy horse racing
24		contests. (Midland Decl. ¶ 43, Exs. E,
25		F; Daruty Dep. at 247:14-248:3,
26		393:11-395:2, 396:4-399:12.) No one
27		from the Plaintiffs asked Derby Wars to
28		stop using Plaintiffs' tracks in Derby
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4		Wars' contests at any time prior to the
5		lawsuit being filed. (Daruty Dep. at
6		181:25-182:21, 183:7-11, 185:23-186:2;
7		Ritvo Dep. at 145:6-14; Rogers Dep. at
8		173:1-174:17, 179:12-180:15, 184:12-
9		25, 192:12-19, 195:7-19, 198:22-
10		200:16; Gierl Decl. ¶ 14, Ex. M.)
11		DISPUTED also because it lacks
12		foundation and is otherwise
13		objectionable. See DW's Evidentiary
14		Objections. Derby Wars does not
15		dispute that Plaintiffs have not provided
16		consent to Derby Wars "to accept a
17		wager from a resident of the States of
18		California, Florida, Maryland or
19		Oregon."
20	65. No Plaintiff has ever received any	DISPUTED in part. Derby Wars
21	money from Defendant with respect to	disputes that the entry fees for its
22	wagers (or entry fees) accepted by	contests are "wagers" or "wagering,"
23	Defendant.	and that it is required to pay any money
24		to Plaintiffs. Derby Wars further
25	Daruty Dec., ¶ 24.	disputes that no Plaintiff has ever
26		received money from Derby Wars; in
27		2015, Santa Anita received sponsorship
28		money for marketing Derby Wars'
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

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1		
1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		fantasy horse racing contests. (Midland
5		Decl. ¶ 43, Exs. E, F; Daruty Dep. at
6		247:14-248:3, 393:11-395:2, 396:4-
7		399:12.) DISPUTED also because it
8		lacks foundation and is otherwise
9		objectionable. See DW's Evidentiary
10		Objections. Derby Wars does not
11		dispute that it has made no other
12		monetary payments to Plaintiffs.
13	66. Defendant does not have any	DISPUTED. Derby Wars disputes that
14	agreements with any of the Plaintiffs.	it is required to have any agreements
15		with Plaintiffs. Moreover, Derby Wars
16	Daruty Dec., ¶ 25.	entered into a marketing and
17		sponsorship agreement with Santa Anita
18		for the 2015 race year, under which
19		Santa Anita delivered thousands of
20		email advertisements which promoted
21		Derby Wars' fantasy contests to Santa
22		Anita's customers. (Midland Decl. ¶ 43,
23		Exs. E, F; Daruty Dep. at 247:14-248:3,
24		393:11-395:2, 396:4-399:12.)
25		DISPUTED also because it lacks
26		foundation and is otherwise
27		objectionable. See DW's Evidentiary
28		Objections.

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4	67. Defendant has never received	DISPUTED in part. Derby Wars denies
5	consent from any racetrack to conduct	that is must receive the "consent" from
6	these contests.	any racetrack to conduct its fantasy
7		contests. Derby Wars further disputes
8	Midland Depo., 185:13-17.	that Plaintiffs failed to consent to its
9		fantasy contests for the more than four
10		year period that Plaintiffs knew of, and
11		did not object to, Derby Wars' contests,
12		as Plaintiffs have known about Derby
13		Wars' conduct since approximately
14		September 2011. (Daruty Dep. at
15		141:14-147:22, 148:5-150:19, 152:16-
16		154:16, 155:10-156:17, 156:23-158:15,
17		159:12-160:5, 160:10-161:24, 164:11-
18		167:10, 168:5-170:7, 171:3-24, 172:4-
19		173:19, 189:21-194:3, 393:11-395:2,
20		396:4-399:12; Rogers Dep. at 112:12-
21		113:25, 115:17-117:21, 118:8-119:22,
22		121:8-125:4, 126:8-12, 128:24-134:2,
23		135:13-23, 138:6-141:9, 144:2-146:16,
24		147:23-151:5, 152:20-153:1, 162:4-
25		164:19, 164:23-165:17, 166:23-167:7;
26		Ritvo Dep. at 122:16-124:18; Midland
27		Decl. ¶¶ 26-27, 38-39; Gierl Decl. ¶¶ 4-
28		13, 21, Exs. C-O, T.) In addition,
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		Derby Wars entered into a marketing
5		arrangement in for the 2015 race year
6		with one of Plaintiffs' tracks, Santa
7		Anita, whereby Santa Anita advertised
8		Derby Wars' fantasy horse racing
9		contests. (Midland Decl. ¶ 43, Ex. E, F;
10		Daruty Dep. at 247:14-248:3, 393:11-
11		395:2, 396:4-399:12.) No one from the
12		Plaintiffs asked Derby Wars to stop
13		using Plaintiffs' tracks in Derby Wars'
14		contests at any time prior to the lawsuit
15		being filed. (Daruty Dep. at 181:25-
16		182:21, 183:7-11, 185:23-186:2; Ritvo
17		Dep. at 145:6-14; Rogers Dep. at 173:1-
18		174:17, 179:12-180:15, 184:12-25,
19		192:12-19, 195:7-19, 198:22-200:16;
20		Gierl Decl. ¶ 14, Ex. M.) DISPUTED
21		also because the "fact" mischaracterizes
22		Mr. Midland's testimony.
23	68. Defendant has never requested nor	DISPUTED in part. Derby Wars
24	received consent from any Plaintiff to	disputes that the entry fees for its
25	accept wagers on races run at the	fantasy contests are "wagers" or
26	Plaintiffs' race tracks.	"wagering," and that Plaintiffs' consent
27		(or that of any other horse racing
28	Daruty Dec., ¶ 21.	association, horse racing commission or
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

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1	PLAINTIFFS' ALLEGEDLY	DW RESPONSE
2	UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	
3	EVIDENCE	
4		off-track betting association) is
5		necessary for its fantasy contests.
6		Derby Wars further disputes that
7		Plaintiffs failed to consent to its fantasy
8		contests for the more than four year
9		period that Plaintiffs knew of, and did
10		not object to, Derby Wars' contests, as
11		Plaintiffs have known about Derby
12		Wars' conduct since approximately
13		September 2011. (Daruty Dep. at
14		141:14-147:22, 148:5-150:19, 152:16-
15		154:16, 155:10-156:17, 156:23-158:15,
16		159:12-160:5, 160:10-161:24, 164:11-
17		167:10, 168:5-170:7, 171:3-24, 172:4-
18		173:19, 189:21-194:3, 393:11-395:2,
19		396:4-399:12; Rogers Dep. at 112:12-
20		113:25, 115:17-117:21, 118:8-119:22,
21		121:8-125:4, 126:8-12, 128:24-134:2,
22		135:13-23, 138:6-141:9, 144:2-146:16,
23		147:23-151:5, 152:20-153:1, 162:4-
24		164:19, 164:23-165:17, 166:23-167:7;
25		Ritvo Dep. at 122:16-124:18; Midland
26		Decl. ¶¶ 26-27, 38-39; Gierl Decl. ¶¶ 4-
27		13, 21, Exs. C-O, T.) In addition,
28		Derby Wars entered into a marketing
ELPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
2	ALLEGED SUPPORTING	
3	EVIDENCE	
4		arrangement in for the 2015 race year
5		with one of Plaintiffs' tracks, Santa
6		Anita, whereby Santa Anita advertised
7		Derby Wars' fantasy horse racing
8		contests. (Midland Decl. ¶ 43, Ex. E, F;
9		Daruty Dep. at 247:14-248:3, 393:11-
10		395:2, 396:4-399:12.) No one from the
11		Plaintiffs asked Derby Wars to stop
12		using Plaintiffs' tracks in Derby Wars'
13		contests at any time prior to the lawsuit
14		being filed. (Daruty Dep. at 181:25-
15		182:21, 183:7-11, 185:23-186:2; Ritvo
16		Dep. at 145:6-14; Rogers Dep. at 173:1-
17		174:17, 179:12-180:15, 184:12-25,
18		192:12-19, 195:7-19, 198:22-200:16;
19		Gierl Decl. ¶ 14, Ex. M.) Derby Wars
20		does not dispute that neither has
21		requested nor received Plaintiffs'
22		consent to accept wagers on races run at
23		Plaintiffs' racetracks.
24	69. Defendant has never requested nor	DISPUTED. Derby Wars disputes that
25	received consent of any host racing	the entry fees for its fantasy contests are
26	commission to accept wagers on	"wagers" or "wagering," and that
27	Plaintiffs' races.	Plaintiffs' consent (or that of any other
28		horse racing association, horse racing
LPS &		DEFENDANT HORSE RACING LABS, LLC'S

1	DI AINTHEEC ALLECEDI V	DW DECDONCE
2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND	DW RESPONSE
3	ALLEGED SUPPORTING	
	EVIDENCE	
4	Midland Depo., 211:24-212:7.	commission or off-track betting
5		association) is necessary for its fantasy
6		contests. In addition, Derby Wars has
7		contacted the NDRC and CHRB and
8		asked whether Derby Wars was
9		required to be licensed, and was told by
10		each that the licenses that they issue do
11		not cover contests and thus no license
12		was required to offer fantasy horse
13		racing contests. (Midland Decl. ¶ 53.)
14		DISPUTED also because the "fact"
15		mischaracterizes Mr. Midland's
16		testimony.
17	70. Defendant has never requested nor	DISPUTED. Derby Wars disputes that
18	received consent from any off-track	the entry fees for its fantasy contests are
19	racing association to conduct its	"wagers" or "wagering," and that
20	contests.	Plaintiffs' consent (or that of any other
21		horse racing association, horse racing
22	Midland Depo., 212:8-11; 213:2-5.	commission or off-track betting
23		association) is necessary for its fantasy
24		contests. In additon, Derby Wars has
25		contacted the NDRC and CHRB and
26		asked whether Derby Wars was
27		required to be licensed, and was told by
28		each that the licenses that they issue do

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1 2	PLAINTIFFS' ALLEGEDLY UNCONTROVERTED FACTS AND ALLEGED SUPPORTING	DW RESPONSE
3	EVIDENCE	
4		not cover contests and thus no license
5		was required to offer fantasy horse
6		racing contests. (Midland Decl. ¶ 53.)
7		DISPUTED also because the IHA does
8		not define "off-track racing association
9		and therefore is vague and ambiguous.
10		

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